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Utah Supreme Court

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James B. Lee; John B. Wilson; Parsons, Behle & Latimer; Attorneys for Respondents.

E. J. Skeen; Clifford L. Ashton; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Appellants.

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IN THE SUPREME COURT OF THE STATE OF UTAH

FLORENCE J. GILLMOR, STEPHEN T.
GILLMOR, and CHARLES F. GILLMOR,

Plaintiffs and
Respondents,

vs.

EDWARD LESLIE GILLMOR,

Defendant and
Appellant,

(District Court No. C81-3875)

GILLMOR LIVESTOCK CORPORATION,
a Corporation,

Plaintiff and
Appellant,

vs.

STEPHEN T. GILLMOR, FLORENCE J.
GILLMOR, and CHARLES FRANK GILLMOR,

Defendants and
Respondents.

(District Court No. C82-3490)

~~SUPREME COURT~~
~~UTAH COURT OF APPEALS~~
BRIEF

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Supreme Court No. 19683

BRIEF OF APPELLANTS

Appeal from the Judgment of the Third District Court
In and For Salt Lake County
Honorable J. Dennis Frederick, Judge

PARSONS, BEHLE & LATIMER
JOHN B. WILSON
JAMES B. LEE
185 South State Street
Post Office Box 11898
Salt Lake City, Utah 84147

Attorneys for Respondents

VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. J. SKEEN
CLIFFORD L. ASHTON
50 South Main Street, Suite 1600
Post Office Box 3400
Salt Lake City, Utah 84119-3400
Attorneys for Appellants

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VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. J. SKEEN
CLIFFORD L. ASHTON
50 South Main Street, Suite 1600
Post Office Box 3400
Salt Lake City, Utah 84110-3400

Attorneys for Appellants

Attorneys for Respondents

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Defendants and
Respondents.)

(District Court No. C82-3490))

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASES

District Court Case No. C81-3875 is a suit to recover damages for alleged trespasses on partitioned ranch lands and for injunctive relief and there is a counterclaim for similar relief.

District Court Case No. C82-3490 is an action for a judgment declaring that Stephen T. Gillmor had no interest in certain leased grazing land and for injunctive relief.

DISPOSITION IN LOWER COURT

The trial court in District Court Case No. C81-3875 awarded damages in the amount of \$49,294.04 to Stephen T. Gillmor and restrained future trespassing by both plaintiffs and defendants. No damages were awarded to the defendants and counterclaimants. No findings of fact were made in District Court Case No. C82-3490 and no judgment was made and entered.

RELIEF SOUGHT ON APPEAL

The appellants seek reversal of the judgment in Case No. C81-3875 and remand with directions to eliminate certain items of damage not supported by competent evidence and awarded contrary to law and to award damages on the defendant's counterclaim against plaintiff Stephen T. Gillmor and seek a remand of Case No. C82-3490 with directions to make findings of fact and to make and enter a judgment on all issues.

PRELIMINARY STATEMENT

The record consists of a 531 page volume of pleadings and related documents, two volumes of transcript numbered to follow the first volume and a small volume of 67 pages numbered separately. References to the large volume and the transcript will be (R-) and references to the small volume will be (R-C82-3490-p-)

STATEMENT OF FACTS

The facts in the two consolidated cases will be separately stated as the issues are widely different.

FLORENCE J. GILLMOR, et al, vs. EDWARD L. GILLMOR

C81-3875

This action was filed May 12, 1981, by Florence J. Gillmor and Charles F. Gillmor, lessors, and Stephen T. Gillmor, lessee, against Edward Leslie Gillmor to recover damages for alleged trespass on those parts of the partitioned ranch lands in Salt Lake and Summit Counties which were awarded to the above-named lessors, comprising three-fourths of the whole. During the trial the Court suggested that Edward Leslie Gillmor be referred to as "Bud", and that his son, Edward Jr., be referred to as "Luke". These names will be used in this brief. (R-777)

The partition decree, made and entered in the case entitled Edward L. Gillmor, et al, vs. Florence J. Gillmor, et al, Civil No. 223998, was dated February 14, 1981. It was appealed to the Supreme Court of Utah and was affirmed insofar as pertinent here on the 3d day of December, 1982. There are some 21 blocks and 84 separate parcels of land described in the decree, which, prior to the partition, were for many years grazed by Bud's livestock. During the period of time in which the alleged trespasses occurred there were no fences separating the three-fourths of the land leased to Stephen and the one-fourth owned by Bud and grazed by Bud's livestock.

A counterclaim was filed by Bud against the respondent, Stephen, alleging trespasses by Stephen's sheep on Bud's one-fourth of the land.

The land involved in the trespass case, comprising large acreages in Salt Lake and Summit Counties, as indicated above, was divided by the partition decree in Gillmor v. Gillmor, Civil Case No. 223998, and has been before this Court twice. The first decision, dated March 23, 1979, was unreported and the second decision is reported in 657 Pacific 2nd at page 736. The various blocks of land are described in the decree, by names as well as by legal descriptions, and the names were used by the attorneys and witnesses at the trial of this case. The numerous blocks and parcels of land in Salt Lake County are shown on Exhibit P-1 and for the convenience of the court are shown in the same colors on a map attached to this brief. As indicated in the testimony, the land shown in orange was awarded to Bud, the land shown in yellow was awarded to Florence Gillmor and to Charles F. Gillmor, and certain leased land is shown in yellow and is cross-hatched.

Likewise, the lands in Summit County in the Park City area and in Township 6 East are shown by the same colors on the attached separate maps.

Bud, in addition to the awarded land in the partition suit, had leases in 1981 as follows:

L.D.S. Church - Salt Lake County - 1100 acres
(R-693); Exhibit P-8 and P-9.

*Swaner Lease - Salt Lake County - Exhibit P-36.

Salt Lake City Airport - Salt Lake County -
(R-563-566)

Dale Hansen - Salt Lake County - (R-1209)

Peterson - Salt Lake County - (R-1211)

Bettilyon - Salt Lake County - 100 acres -
(R-1212)

Deseret Livestock Co. - Morgan County - 5,000
acres - Exhibits P-6, P-7

Mayflower - Summit County - Exhibits D-31, D-32,
and D-33

Pasture - Wasatch County - (R-1152)

*Both Bud and Stephen claimed ownership of the Swaner lease, as indicated above, and the case of Gillmor v. Swaner and Stephen T. Gillmor, C81-3614, was filed in the year 1981 to determine which lease for 1981 was valid at the time of the alleged trespasses.

One item of damages claimed by Stephen was that, in the spring of 1981, because of the use and grazing of livestock by Bud on land he claimed was leased to him by Robert B. Swaner, Stephen had to move one herd of sheep to Park City for lambing, and that, as a result, he had suffered a decrease in the number of lambs produced to his damage. (R. C82-3490, p.43)

The details of the alleged trespasses and items of damage claimed will be discussed under the heading "Argument" to avoid repetition.

At the time of the final argument after the trial, Stephen's attorney submitted to the court, and served on Bud's attorneys, a trial brief which contained specific items of damages claimed by Stephen and with computations of amounts of money based on "AUMs" (animal unit months). Bud's attorney requested time to read the brief and study the computations. We quote from the record:

"Mr. Lee: Your honor, excuse me, one last matter. We have prepared an additional brief addressed to the issue of damages. We would submit this to the court and submit one to counsel.

"Mr. Ashton: Your honor, may we have an opportunity to read and answer it?

"The Court: I will have to take this matter under advisement, gentlemen. I will grant you that request, Mr. Ashton. It was my view that I would probably be prepared to render a Memorandum Decision within approximately one week. How long do you think it will take to get your responsive brief?

"Mr. Ashton: In less than a week.

"The Court: Very well. Get it to me as soon as possible.

"Mr. Ashton: We may not respond. I think your honor has heard all he wants to of this case.

"The Court: Well, that's about right. But if you choose not to respond, please let me know.

"Very well, Gentlemen. I will notify you when I am ready to render my decision."

(R. 1296, 1297)

The argument was on October 20, 1983, when the trial judge made the above quoted statement. Despite the assurance that there would be time to read the brief and study the computations, and to respond thereto, the Judge issued a Memorandum dated the next day (October 21, 1983) adopting, to the dollar, the computations in the trial brief as follows:

"There was evidence of numerous documented instances of trespass testified to involving the livestock of Edward Leslie Gilmore (sic) on leasehold lands of Steven (sic) T. Gilmore (sic) sufficient to establish by a preponderance that Steven (sic) T. Gilmore (sic) suffered damages thereby as set forth in Plaintiffs' Trial Brief on the Issue of Damages (as itemized on the visual aid submitted to the Court entitled Damages from Trespass by Sheep) in the amount of \$8,100.00.

"In addition, the Court believes that there was sufficient evidence to establish by a preponderance that Steven (sic) T. Gilmore (sic) was required by virtue of the trespasses referred to to transport a herd of sheep to Park City during the lambing season resulting in a significantly reduced lambing percentage, to-wit: 74%. The net effect of this reduction in lambing percentage supports the claim for lambs lost in the amount of 352 head, resulting in damages of \$23,340.00 (set forth in the visual aid submitted to the Court entitled Lamb Loss Based on Docking Counts and Plaintiffs' Trial Brief on the Issue of Damages)."

(C82-3490 - pp. 60-65)

The decision is reflected in the Findings of Fact, paragraphs 7 and 8, as follows:

"7. Stephen Gillmor was damaged in 1981 by defendants' sheep grazing on lands in his possession in the amount of \$8,100, and by defendants' cattle grazing on lands in his possession in the amount of \$17,504.04.

"8. As a result of defendants' utilization of lands rightfully in the possession of Stephen Gillmor, Stephen Gillmor suffered a decrease in his lamb production in the Spring of 1981 in the amount of 352 head of lambs with a value of \$23,340."

(R. 504-508)

The total judgment is for \$49,294.04. The appeal is from this judgment.

GILLMOR LIVESTOCK CORPORATION vs STEPHEN T. GILLMOR, et al.

C82-3490

This case was filed under the Declaratory Judgment Act, Title 78, Chapter 33, for a decree determining that Stephen had no interest in a large acreage of land leased by Bud from the L.D.S. Church, located in Salt Lake County, South and West of the International Center, and for injunctive relief. (R. C82-3490 pp. 1-3) The written leases for 1981 were introduced in evidence, Exhibits P-8 and P-9. The file contains an order of Judge Sawaya, dated February 17, 1982, relating to the division in 1982 of the Salt Lake County and Summit County property. (R. 265-270) Testimony was given regarding the use of the land during 1981, 1982, and to the date of trial. (R. 694-696)

The Court made no findings of fact regarding the declaratory judgment issues and neither granted nor denied injunctive relief relating to the L.D.S. Church lease.

This appeal is from the judgment ignoring the issues in the declaratory judgment suit.

I.

THERE IS NO COMPETENT EVIDENCE
SUPPORTING THE DAMAGE AWARDS
OF \$8,100. AND \$17,504.04
FOR TRESPASS OF SHEEP AND CATTLE.

It is well settled that the plaintiff, in an action for damages for trespass of animals, has the burden of proving all facts essential to his right of recovery. Ordinarily this means that he must prove his ownership or rights to the land in controversy and damages.

3A CJS pp. 784, 785.

The elements of ownership or right of use and damages must be established by a preponderance of the evidence. Such evidence must not be indefinite, uncertain or speculative.

3A CJS pp. 786, 793.

The Utah law on this subject was stated many years ago in the case of Anderson v. Jensen, 71 Utah 295, 265 P. 745, in a case involving trespasses by the defendant's sheep:

"As a general rule when the owner of property is deprived of the use thereof, the measure of damages is the reasonable rental value of the property during the time the owner is wrongfully kept out of possession."

In this case the plaintiffs in their first amended complaint, pleaded that Bud's sheep and cattle have

"-----continuously and repeatedly trespassed since January 1, 1981, and continue to trespass upon lands owned or leased by plaintiffs to the irreparable injury of plaintiff Stephen T. Gillmor.

Said instances of trespass include, but are not limited to, those set forth in the Affidavit of Stephen T. Gillmor, attached hereto as Exhibit 'B'."

(R. 320)

The affidavit lists instances when Stephen saw Bud's livestock grazing on his leased land, summarized as follows: (R. 320-324)

March 31, 1981 - 1,000 sheep in "West grazing area" on land owned by Florence Gillmor and Charles F. Gillmor.

April 3, 1981 - 150 cows and calves grazing on property owned by Florence and Charles F. Gillmor and saw them move off toward ranch property owned by Bud where they were corralled.

April 3, 1981 saw 400 sheep bunched on state land and saw fresh tracks indicated that they had been driven off Charles F. Gillmor land within last two hours.

April 5, 1981 - Saw 1,000 - 1,200 ewes on Jeremy property.

April 6 and 7, 1981 - Flew over leased property and saw that 400 sheep were grazing on Florence and Charles F. Gillmor property.

April 6 and 7, 1981 - 100 head of cattle on Florence Gillmor land in Sections 5, 7 and 8, T. 1N, R. 2W., and on Charles F. Gillmor land in Section 4, same township, and cattle have remained in this area since that time.

April 6 and 7, 1981 - On same flight saw 75 sheep on Florence Gillmor land in Section 8 and a large concentration on Charles F. Gillmor land in Sections 3 and 4.

April 9, 1981 - Saw cattle mentioned above turned onto Florence and Charles F. Gillmor land.

April 18, 1981 - 1,000 - 1,200 ewes moved South and mixed with approximately 30 head of my sheep located on Jeremy property in Section 17.

April 19, 1981 - Last mentioned ewes were on West one-half of Section 8. These sheep were driven off the property in the afternoon of April 20, 1981.

April 21, 1981 - Observed large number of ewes and lambs on Charles F. Gillmor land in Section 4.

At the trial, Stephen testified as to the above incidents and to additional specific trespasses described similarly to those summarized above. (R. 769-781, 883-904, 907-915)

Stephen's testimony at the trial of incidents of trespass in 1981, in Salt Lake County, are summarized as follows:

April 1, 1981 - Near 1,000 of Bud's ewes in Sections 17, 18, into part of 16. (R. 769, 770)

April 2, 1981 - No change. (R. 770)

April 3, 1981 - Three riders gathering a group of cattle proceeding toward old ranch. A bunch of yearling ewes into state ground. (R. 770-771)

April 6, 1981 - Flew over all areas in a small plane. Saw same group of dry ewes out West and dries in Section 31. Cattle confined in hospital and large group in West Grazing Area. (R. 771)

April 9, 1981 - About 100-150 cattle "running free" North of hospital area at old ranch. (R. 772)

April 10 - April 15, 1981 - Bud's sheep occupied the Knolls area Eagle Hill and East Eagle Hill. (R. 773)

April 24, 1981 - Bud had 300 - 350 ewes drifting South from Brown's Island. (R. 779)

April 26, 1981 - Same bunch of ewes in same, general area. (R. 779)

April 27, 1981 - Practically the same as April 26th, except cows were mixed with our sheep. (R. 780)

June 5, 1981 - Observed a large bunch of Bud's cows scattered in the area - mainly in Section 31. (R. 882)

December 12, 1981 - Saw 84 head of Bud's cattle on the Swaner lease area. (R. 914, 915)

Stephen's testimony of trespasses by Bud's live-stock in 1981 in the Park City and 6 East areas is summarized below:

July 12, 1981 - Saw Bud put 47 cows and their calves in the Steer Pasture, Park City (R. 883)

July 22, 1981 - Bud's sheep were in an area pointed to on Exhibit P-2 where "...we can see yellow over the top of the white." (R. 886)

July 31, 1981 - Small bunch of Bud's cows in the Homer meadow. (R. 887)

August 5, 1981 - 42 cows and calves on Section 26 at the head of Perdue Creek and down into the Baldwin bed ground in 6 East. (R. 887)

August 6, 1981 - Bud's cows were continually moving East from the orange area (on Exhibit 2) in 6 East and the herder was driving them back. (R. 888)

August 9, 1981 - Ten pair of Bud's cows were in the Pace meadow in the Park City area. The same ones I had seen in Homer Meadow. (R. 892)

August 13, 1981 - Bud's sheep were on the North side of Elkhorn divide in 6 East near the center of Section 15. (R. 894, 895)

August 22, 1981 - A thousand or more of Bud's sheep were separated at corral on 6 East and 300 more in the timber. (R. 902, 903)

August 31, 1981 - Observed same number of Bud's cattle along Perdue Creek and sheep in the same area (R. 904)

September 15, 1981 - Using binoculars from top of ridge saw a large number of Bud's sheep shading in the Baldwin Bed grounds. (R. 904)

October 14, 1981 - Same bunch of Bud's cows were in the Steer pasture. (R. 909)

October (No date specified) - Saw large bunch of Bud's cattle on Noranda lease. (R. 909)

November 1, 1981 - Saw large number of Bud's cows at loading facility on "90" at Park City. (R. 909,910)

November 2, 3 - Cattle were loaded to be moved out. (R. 910,911)

November 19 - 20, 1981 - About 2200 sheep being loaded at same area on 90 at Park City (R. 912,913)

There was little specific testimony as to the period of time Bud's sheep and cattle in definite numbers were actually grazing on land leased by Stephen except when Stephen was asked about 40 head of cows and calves which he testified were mixed with his sheep in Salt Lake County.

"Q. Do you know how long they stayed there?

"A. Well, as far as I know all spring." (R. 781)

The testimony quoted and summarized above is the only definite statement by Stephen that a definite number of cattle trespassed for any substantial period of time on Stephen's definitely identified leased property.

James Gillmor, Stephen's son, testified as follows:

April 24, 1981 - saw a large bunch of cattle, estimated to be 300, on the West side of the Sewer ditch all through April, May, and part of June. (R. 794,795) (By Order of Judge Leary, dated March 23, 1981, Exhibit P-5, Bud was permitted to graze livestock in the area Westerly and Southerly of the sewer canal. See par. 4)

May 25, 1981 - Saw an unknown number of Bud's sheep being driven North in the Park City Area. (R. 797,798)

July 3, 1981 - 40 head of bucks put in the buck pasture (R. 798,799)

July 8, 1981 - James flew in a small plane and saw 75 head of cattle in a slough area and spread over Section 31. (One-fourth of Section 31 belongs to Bud) (R.800)

July 13, 1981 - Saw 24 head of cattle on Section 31. (R. 801)

August 3, 1981 - Saw 11 cows and calves, 3 horses, and 24 bucks in the buck pasture - Park City. (R. 801)

August 6, 1981 - 11 cows and calves being moved by Edward from 90 area - Park City. (R. 805,806)

August 17, 1981 - Edward's sheep and sheep camp near center of Section 15. (R. 808) Sheep bedded in the area of the dividing line between Florence and Edward properties. (R. 809, 810)

August 21, 1981 - Saw Stephen and Edward's sheep mixed and built a corral to separate them. (R. 810,811)

August 22, 1981 - Separated sheep - Overheard Edward say that there were 543 head of Stephen's sheep. Edward's sheep were driven South over the Elkhorn divide except for 300 head which were driven over the divide later. (R. 811,812)

August 24, 1981 - Saw 450 of Edward's sheep lying on Frank's property. (R. 812)

October 6, 1981 - Separated 1200 to 1300 of Bud's sheep at the corral in the North part of Section 3, 6 East. About 600 of our sheep mixed with Edward's sheep at Lodge Pole (R. 813,814) and remained in Bud's herd for 20 days. (R. 308,309)

October 20, 1981 - Stephens and Bud's sheep were corralled by Bud at Todd Hollow, Park City area. 679 of Stephen's sheep were in Bud's herd. Put our sheep back in the corral. (R. 815)

October 19, 1981 - Saw large bunch of Bud's sheep on 90 area.

November 2, 1981 - Saw Bud loading 400 cattle at the 90 at Park City. (R. 283)

November 22, 1981 - Saw sheep being loaded at the 90 area. (R. 284)

It is apparent from the language of the complaint and first amended complaint and from the testimony summarized above that the plaintiffs' theory of trespass damages was that Bud's livestock had repeatedly trespassed on his various parcels of leased land. The only testimony regarding the amount of damages was that relating to AUM's (animal unit months) and the value thereof. To make a case for a definite amount of money, the plaintiffs had the burden of proving (1) the number of trespassing livestock, and (2) the length of time that number of livestock trespassed on the plaintiffs' leased land.

It is abundantly clear that the recitation of numerous incidents, as summarized above, did not prove the necessary facts to support a damage award. The number of livestock involved was indefinite and there was little or no testimony as to the duration of trespass. Between the end of the trial (October 14, 1983) and the oral argument, the plaintiffs prepared overlays for Exhibits P1, P2, and P3 and placed thereon green ink circles about one-half inch in diameter with a date in each circle corresponding to the incidents of trespass as testified to by Stephen and James.

At the oral argument on October 20, 1983, the plaintiffs abandoned the theory set out in the complaint and first amended complaint. The two complaints sought recovery for specific acts of trespass. There is no allegation that Bud was grazing livestock

on Stephen Gillmor's land 75% of the time; that he had overstocked his land and that lamb crops had been decreased due to mixing. There was handed to the court at the time of the argument on October 20, 1983, a document entitled Plaintiffs' Trial Brief on the Issue of Damages, dated October 20, 1983. This brief appears on pages 35 to 45 in the separate record entitled:

"DISTRICT COURT NO. C82-3490 as part of C81-3875

"SUPREME COURT NO. 19683

"GILLMOR LIVESTOCK CORP.,

"Plaintiff

"vs.

"STEPHEN T. GILLMOR, et al

"Defendant-"

It is stated in the brief, page 36:

"The evidence demonstrates that, despite the partition decision in February, 1981, Bud Gillmor continued to operate the same numbers of livestock historically run on the Gillmor fee and use lands in Salt Lake and Summit counties despite the fact that he had available only one-quarter of the land historically utilized for that purpose. The result was an inevitable overflow of animals on to the surrounding lands leased and used by Stephen Gillmor."

Aside from the failure of the plaintiffs to allege the theory of damages set out in the trial brief on the issue of damages, the basic statement of fact in the first sentence of page 2, that Bud continued to operate the same numbers of livestock, "...on the Gillmor fee and use lands in Salt Lake counties..." is contrary to the uncontradicted evidence that he leased large

acres of land which are not mentioned in the calculations on the exhibits attached to the brief. The list of leases appears on pages 4 and 5 of this brief.

On Exhibit A to the brief the following calculations were accepted by the trial court without change of a dollar:

"DAMAGES FROM TRESPASS BY SHEEP

3-24-81 to 11-24-81 8 Months

1125 Sheep on Salt Lake County and
Summit County Gillmor Land:

1125 Sheep - 5 Sheep/A.U.M. x 8 months = 1800 A.U.M.'s

1800 A.U.M.s x 75% = 1350 A.U.M.'s

1350 A.U.M.s x \$6.00* per A.U.M. = \$8,100

*Based upon defendant's Deseret livestock lease rate."

The following appears on Exhibit B:

"DAMAGES FROM TRESPASS BY CATTLE

3-17-81 to 2-17-82 10 Months

169 cattle on Gillmor Land:

169 Cattle x 10 months = 1690 A.U.M.'s

1690 A.U.M.'s x 75% = 1267 A.U.M.'s

1267 A.U.M.'s x \$7.96* per A.U.M. = \$10,085.32

217 cattle divided 4.27 months on Echo
lease and 5.73 months on Gillmor Land:

217 cattle x 5.73 months = 1243 A.U.M.'s

1243 A.U.M.'s x 75% = 932 A.U.M.'s

932 A.U.M.'s x \$7.96* per A.U.M. = \$ 7,418.72

TOTAL \$17,504.04

*Based upon defendant's Echo Lease rate."

The only thing correct about this computation of damages is the arithmetic. There is no evidence, opinion or otherwise, that 1125 of Bud's sheep and 169 cattle were on Gillmor land all of the time and that he should be charged an amount equal to 75% of the whole. The statement regarding 217 cattle is without support.

The following table, with references to testimony, indicates generally where Bud's sheep and cattle grazed in 1981:

<u>DATES</u>	<u>LIVESTOCK NUMBERS</u>	<u>PLACES</u>	<u>PAGES IN RECORD</u>
Jan 1 - Mar 23	1429 Sheep	Tooele County Lease	698, 844, 845, 1088
Jan 1 - Mar 27	700-800 Sheep	Tooele County Lease	698, 844, 845 1095
Jan 1 - First Part of April	All cattle	Old Ranch - on hay put up summer before	1125, 1126
Jan 1 - Mid Mar	421 Scad Sheep	Salt Lake City and Swaner leased land	693, 698, 1208, 1209
Mid Mar - Apr 6	379 Yearling Sheep	Church lease	695
Mid Mar - May 15	702 Sheep	West Grazing City lease	697
Mid Mar - May 24	365 Sheep	Park City	697
Mid Apr - Late May	200 Sheep	Whitehead	1096
Mar 17 - Jun 9	224 Cows	Use land and private land	703, 704
Apr 1 - May 19	1125 Sheep	Church lease	696
Apr 6 - July	317 Yearling Sheep	Use and State	705
May 19 - Jul 7	1125 Sheep	Clark and May-flower leases	1132, 1145
Jun 9 - Oct 13	1605 Sheep	Deseret Live-stock lease	709, 711, 1132

<u>DATES</u>	<u>LIVESTOCK NUMBERS</u>	<u>PLACES</u>	<u>PAGES IN RECORD</u>
Jul 7 - Oct 22	1125 Sheep	Six East (Lost Creek)	706, 1149, 1187
Oct 13 - Nov 25, 26	1605 Sheep	Clark Ranch	1187, 1241
Oct 22 - Nov 25, 26	1125 Sheep	Clark Ranch, Leased land, Todd Hollow	1187, 1241
Aug 6 - Nov	60 Cows, 47 Calves, 9 Yearlings	Six East	708
Jul - Aug	57 Cows, 58 Calves, 1 Steer, 3 Bucks	Steer pasture	1228
Aug - Sep	57 Cows, 58 Calves 1 Steer, 3 Bulls	Wasatch County lease	1230, 1231
Nov 25, 26 - Dec 31	2040 Sheep	Tooele County leased land	1241

With reference to the sheep, it will be noted that the 1125 head which the computation in the brief on damages shows were grazed for 8 months solely on Gillmor land, were, actually, for periods beginning in mid March and ending July 7 grazed on the church leased lands, on the Salt Lake City leased lands, on the large area of Mayflower leased land in the Park City area, and on the area at Clark Ranch. The grazing on leased land would cover at least three months of the eight months included in the computation. The record is clear that part of the remaining five months the sheep were on use land in the West grazing area and Stephen's sheep and Bud's sheep were mixed, both near the Goggin Drain in Salt Lake County and in the Six East area, where large numbers crossed the boundary lines.

The mixing was due to lack of fences on relatively small parcels of land. We quote from the testimony of Stephen:

"Q. Do you remember in that conversation you said to Luke, we better see if we can divide these properties up in some practical way because there's no way that we are going to be able to keep each other's animals off each others property?

"A. That's exactly what I said." (R. 972)

Exhibit B, Damage for Trespass of the Cattle, attached to the plaintiffs' brief on damages, indicates that from March 17, 1981, to February 17, 1982, 169 head of cattle grazed on Gillmor lands to the damage of Stephen in the amount of \$10,085.32 and 217 head grazed 4.27 months on the Echo leased land and 5.27 months on Gillmor land. There is no testimony to support the breakdown into months and fractional months. The above table indicates that from January 1 to the first part of April, all cattle were fed hay at the old ranch. The hay was grown the previous year. Obviously this period of about 3 months should be eliminated from the A.U.M. computation. (R. 1125, 1126). The month of December, 1981, is part of the winter when hay was fed and should be eliminated. The month when 57 cows, 58 calves, 1 steer, and 3 bulls were pastured on the Wasatch County leased land should not be included in the computation.

The Gillmors did not own the "use" land. Over the years, Bud Gillmor testified, the duck clubs had permitted moderate grazing on large acreages of land near the Gillmor land. (R. 1034) There is no evidence in the record that Stephen had a leasehold or other interest for which he can charge \$7.96 per A.U.M., or that his lessors had an interest in such lands. There is no evidence as to

how long cattle were simply trespassing on this land and how long they were on Gillmor land. In the computations on Exhibit B to the trial brief on damages, there is no recognition of the time the cattle were on those lands not owned or leased by the Gillmor family.

The tabulation of land use shows that for nearly three months 224 head of cattle were on use land and private land.

It is apparent, after reviewing the pleadings and the tabulation showing where Bud's cattle and sheep were grazed, that the A.U.M. computations attached to the trial brief on damages are (1) contrary to the pleadings of specific trespasses on specific land, (2) not supported by, but are contrary to, undisputed evidence, (3) are not definite and certain, and (4) are speculative and do not reasonably tend to establish the amount of damages set out in the findings of fact.

II.

THE COURT ERRED IN FINDING, CONCLUDING AND ADJUDGING THAT
STEPHEN SUFFERED DAMAGES FOR A DECREASE
IN LAMB PRODUCTION IN THE AMOUNT OF \$23,340,
AS A RESULT OF BUD'S UTILIZATION OF LAND
RIGHTFULLY IN THE POSSESSION OF STEPHEN

Finding of Fact No. 8 provides:

"As a result of defendant's utilization of lands rightfully in the possession of Stephen Gillmor, Stephen Gillmor suffered a decrease in his lamd production in the spring of 1981 in the amount of 352 head of lambs of a value of \$23,340."

(R. 506)

This finding of fact is based on "Exhibit D" attached to the trial brief on damages, but is changed to state very clearly and definitely that the loss is 352 lambs of a value of \$23,340. The Exhibit shows "352 lambs x \$45.00 = \$15,840."

Exhibit D is based on testimony of Stephen as follows:

"Q. Now, were there any of your animals that you were not able to lamb in that area, Mr. Gillmor?

"A. Yes, there were.

"Q. How many number of ewes were you not able to lamb in that area?

"A. The herd of ewes that I mentioned earlier that we purchased that were in Rush Valley, I did not bring into this area to lamb.

"Q. Is there any reason why you didn't bring them into this area?

"A. Well, these ewes were to lamb in the first of May, and my intention was to lamb them on the East side, the ranch area, crosshatched Swaner area in the areas in yellow and lamb in that area, in the ranch area East of the Black Slue.

"Q. Why weren't you able to do that?

"A. The land was completely occupied by cattle and dry sheep and horses belonging to Bud.

"Q. Now, you are talking about the area North of the old ranch on Exhibit P-1 and the yellow cross-hatched yellow areas; is that correct?

"A. That's true.

"Q. What did you do with those sheep?

"A. I had no choice. I took them to the Park City area referred to earlier in the testimony as the quarry property, turned them loose on the quarry property, and that's where they lambed.

"Q. Now, how many sheep did you say there were in that group, Mr. Gillmor?

"A. The purchase was 980. When they went up there, it was under 970.

"Q. Now, Mr. Gillmor, did you keep a record of the production which you received from your lambing operations in 1981?

"A. Yes, I did." (R. 766-768)

* * * * *

"Q. Now, do you have figures for your Summit County ewes?

"A. Yes, I do.

"Q. Can you tell us what they were?

"A. I got 979 ewes, 725 lambs.

"Q. And your production?

"A. 74 percent." (R. 769)

* * * * *

"Q. So the lambs in Salt Lake County were valued at \$50, and the lambs located in Summit County were valued at \$45; is that correct?" (R. 784-785)

It will be noted that the 352 lamb decrease was said by Stephen to have resulted from Bud's occupation of the Swaner lease area. He said he was forced to go to Park City to lamb. This is stated in Finding No. 8 as follows:

"As a result of defendants' utilization of lands rightfully in the possession of Stephen Gillmor, Stephen Gillmor suffered a decrease in his lamb production...."

The record is clear that the ownership of a lease on the Swaner land in 1981 was the subject of a lawsuit pending in the District Court of Salt Lake County.

We quote:

"Q. So the sheep that were in the International Settlement down in the area that you have there as early as January, how many of those were there?

"A. Four hundred fifty, I think, yearlings.

"Q. Then you moved those up to the shaded area up here (indicating)?

"A. Swaner lease East of the sewer ditch.

"Q. Was there some dispute about who had the right to the Swaner property at that time?

"A. My father had prepaid the lease.

"Q. Isn't there a lawsuit pending right now between your father and Mr. Gillmor as to who is entitled to that Swaner Lease that's pending in this court?

"A. Well, we have paid the lease, prepaid the lease then. He prepaid the lease in '82, and he's prepaid the lease in '83.

"Q. That's also claimed by Mr. Gillmor? He's done the same, Mr. Ed Gillmor.

"Mr. Lee: Your honor.

"Q. (By Mr. Ashton) Well, in any event, there's a dispute, and that's all I wanted to point out, that suit is pending, and there is a dispute with that. I don't think that this court can decide who is entitled to that property when there's a case pending about it.

"Mr. Lee: Your honor, if I might, so the court will be aware, there's no case pending. Now, that's been stated. There's nothing on the record. There's been no case filed on that particular Swaner property.

"Mr. Ashton: Then I'm in error.

"Mr. Lee: You are.

"Mr. Ashton: Isn't there a piece of Swaner property there is a suit pending on?

"Mr. Lee: Not involving Steve Gillmor or his lease or Bud Gillmor or his. When you keep making that statement, Mr. Ashton, you are misleading this court.

"Mr. Ashton: Well, I don't intend to mislead this court.

"Mr. Skeen: There is a case pending, but I can't tell you --

"Mr. Ashton: There is a case pending. What it is, of course, we can determine that without this witness.

"The Court: We may determine that. At this point, however, I don't propose either of you intend to have me rule on the Swaner property. That's not an issue. (Emphasis added.)

"Mr. Ashton: I may have misled the Court, and I certainly didn't intentionally. We can get that very clear."

(R. 850-852)

* * * * *

"The Court: You may proceed, Mr. Lee.

"Mr. Lee: Thank you, your honor.

"Yesterday when Mr. Ashton was examining one of the witnesses, I think that perhaps Jamey Gillmor, there was an exchange involving whether or not an action had been brought with respect to the Swaner lease. I want to apologize to Mr. Ashton and the court. I did go back and go through the files last night and found that there is a case pending that was filed in 1981 by Mr. Skeen on behalf of Ed Gillmor against the Swaners and included Steve Gillmor disputing who had the lease to that property. So the statement that was made yesterday by counsel that that was in litigation -- and I'm referring to Mr. Ashton -- was correct. I don't think, your honor, we can argue that as to what it means, but at least I want the court to know that, indeed, Mr. Ashton was correct on that.

"Mr. Ashton: Thank you, Mr. Lee. I appreciate that. I know you weren't trying to mislead anybody. The case number, and the Court may want to take judicial notice, is C-81-3614, entitled Edward L. Gillmor vs. Robert B. Swaner, et al.

"The Court: Very well, gentlemen." (R-899)

In view of the court's remarks quoted above, neither party put in the record any evidence regarding the issues in the case of Gillmor v. Swaner, except that Stephen offered Exhibit P-16 which is a handwritten lease with a cancelled check for \$884.00 attached. Exhibit 36-P is Bud's cancelled check for the same amount, payable to Robert B. Swaner Company, with writing for "grazing lease 1981" on the face of the check.

That part of finding of fact No. 8, "...rightfully in the possession of Stephen Gillmor....", explains why Stephen lambled some of his sheep in Park City and suffered the alleged decrease in lamb production. The question as to whom was rightfully in possession can only be determined in the case of Gillmor v. Swaner, et al, and as the Court stated on page 852 of the record, "That's not an issue."

In view of the facts quoted above from the record, it is clear that the finding of fact that Stephen was rightfully in possession of the Swaner lease land was not within the issues in this case. The court so ruled.

It was obvious error for the court to award damages allegedly resulting from lambing the herd in the Park City area instead of on the Swaner land. Furthermore, the evidence is speculative, in the extreme, because no one knows how many lambs would have been saved if the lambing had taken place on the Swaner land. When Stephen took his herd to Park City to lamb at that high altitude, he may have exercised poor judgment. He could have leased other land at lower elevations. There are many factors

which determine lamb losses besides the location of the lambing grounds, including adverse weather conditions. The basic element of proof of a cause attributable only to Bud for the low percentage of lambs produced at Park City is entirely missing, even assuming that Stephen was entitled to possession of the Swaner property.

Finding of Fact No. 8 is not supported by the evidence and that portion of the judgment in the amount of \$23,340.00 should be reversed.

III.

THE COURT ERRED IN COMPLETELY IGNORING EVIDENCE,
MUCH OF WHICH IS UNCONTRADICTED AND ADMITTED
THAT STEPHEN GILLMOR SHEEP TRESPASSED
ON LAND OWNED AND LEASED BY BUD

Luke Gillmor testified in substance that, on January 6th or 7th, 1981, he observed Stephen's sheep and camp in the West part of Section 26 and East part of Section 27 in the 700 North Area, Salt Lake County. (R. 1054-1060) The 600 to 700 sheep and the camp were on land belonging to Bud which is colored in orange on the map, P-1, a copy of which is attached to this brief. The camp was moved the latter part of February to the east -- still on Bud's property (R. 1062) Stephen's sheep were all over the whole area. (R. 1067) The sheep were there until the first of June and the land was completely grazed off. (R. 1071-1072)

In April, Stephen unloaded about 2300 sheep on Bud's land and, there being no feed, they got them out of there.

R. 1074, 1075) Stephen's sheep were all over the 700 North area and the duck club and on Bud's part of Whitehead. (R. 1097)

The above is a summary of some of Stephen's trespasses in the Salt Lake area. It will be noted that he testified as to the period of time Stephen's sheep were on Bud's land and the number of sheep.

Many similar incidents of trespass are described in detail by Bud and Luke in the West grazing area, Park City, and 6 East. (R. 1101 - 1111; 1129 - 1130; 1141 - 1142, 1145 - 1168; 1180 - 1190; 1265 - 1272; 1275 - 1277.)

In its Memorandum Decision, the trial court, although indicating that there were numerous incidents of trespass by the livestock of both disputants on the land of the others, writes, "...the overwhelming weight as to numbers of such trespasses and the constancy thereof were established by the evidence to have been on the part of the defendant, Edward Leslie Gillmor." It is stated further: "The evidence regarding trespasses of Stephen T. Gillmor's livestock and particularly the damage claimed therefrom was inconclusive." (C82-3490 - p. 64) The latter statement appears in finding of fact No. 10. (R. 507)

It is submitted that the testimony of Bud and Luke was more definite than that of Stephen and James because the element of duration of the trespasses was usually supplied. The finding that the evidence of trespasses by Stephen's sheep was "inconclusive" is clearly against the weight of the evidence and constituted reversible error.

IV

THE TRIAL COURT, AFTER GRANTING THE REQUEST OF MR. ASHTON FOR AN OPPORTUNITY TO READ AND ANSWER THE PLAINTIFFS' TRIAL BRIEF ON DAMAGES, WHICH PRESENTED A NEW THEORY OF DAMAGES, DECIDED THE CASE THE NEXT MORNING.

In the Statement of Facts, page 6 of this brief, we have quoted from the transcript the statement of the court granting a request to read the plaintiffs' trial brief on damages and it will not be repeated here. The trial brief was presented to the court and counsel at the end of the oral argument on October 20, 1983. The court's memorandum decision is dated October 21, 1983, adopting, without change in amount, the awards of damages in the amounts of \$8100, \$17,504.04, and \$23,340.

The theory of damages set out in the plaintiff's trial brief on damages was not pleaded, and came as a complete surprise. Bud's attorneys had no opportunity to study the speculative and conjectural approach and had no opportunity to respond by filing a brief or otherwise. The figures involved in the mathematical computations are unsupported by proof upon which the court could base a decree. Graham v. Street, Utah, 270 P 2d 456.

V.

THE TRIAL COURT'S FAILURE TO MAKE
SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND TO ENTER A JUDGMENT IN
CONSOLIDATED CASE NO. C82-3490
WAS REVERSIBLE ERROR.

Rule 52(a) of the Utah Rules of Civil Procedure provides
in part:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A;...."

After quoting the pertinent part of the rule, this Court in Romrell v. Zions First Nat. Bank, N.A., Utah, 611 P.2d 392, without equivocation, well stated the law. We quote:

"This requirement is mandatory and may not be waived. In re Murphy's Estate, 269 Minn. 393, 131 N.W.2d 220(1964); 9 Wright & Miller, Federal Practice and Procedure: Civil §§ 2335, 2574 (1971). Failure of the trial court to make findings on all material issues is reversible error. Rucker v. Dalton, Utah, 598 P.2d 1336 (1979).

In the consolidated case No. C82-3490 issues are raised as to whether Stephen has and had an interest in the Gillmor Live-stock corporation's written lease of a large acreage of land near the Salt Lake Airport. See the complaint (C82-3490, pp 1-3) and Answer (C82-3490, pp. 26-29).

Although the two church leases were introduced in evidence, Exhibits P-8 and P-9, and there was much testimony as to the use of the church leased land for grazing, the trial court made no finding of fact on the issue and made no mention of the lease in the judgment.

This failure to make findings on all material issues is reason alone for the reversal of the cases.

VI.

THE FAILURE OF THE COURT TO MAKE FINDINGS
SUFFICIENTLY DETAILED TO DISCLOSE THE STEPS
BY WHICH THE ULTIMATE CONCLUSION ON EACH ITEM
OF DAMAGE WAS REACHED, REQUIRES VACATING OF THE
JUDGMENT AND REMAND.

Findings of Fact Nos. 7 and 8 are quoted above, and set out three items of damages which, when added together, total the amount of the judgment. These findings do not meet the requirement of Utah law, well stated in the case of Rucker v. Dalton, Utah 598 P.2d 1336. We quote:

"The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law. To that end the findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. Woods Construction Co. v. Pool Construction Co., 314 F.2d 405 (10 Cir. 1963); Salisbury v. Hanover Insurance Co., Wyo. 443 P.2d 135 (1968). The rule as stated in Prows v. Hawley, 72 Utah 444, 271 P. 31, 33 (1928) is:

'that until the court has found on all the material issues raised by the pleadings, the findings are insufficient to support a judgment; and that findings should be sufficiently distinct and certain as not to require an investigation or review to determine what issues are decided.'

"Unless findings of fact meet such standards, application of the proper rule of law is difficult, if not impossible, and the reviewing function of this Court is seriously undermined."

See also the recent case of Bastian v. King, Utah 661 P2d 953.

The findings of damages do not disclose the steps by which the ultimate conclusion on each item of damage was reached and the judgment should be vacated.

CONCLUSION

The burden of proof was on the plaintiffs in the action for damages for trespass to establish (1) the number of livestock trespassing on Stephen's leased land, (2) the duration of each trespass, and (3) either the fair rental value for grazing or some comparable method of determining damages. The findings of damages in the amounts of \$8100 for sheep and \$17,504.04 are entirely unsupported by the evidence, because there is little or no evidence as to the duration of the alleged trespasses and are speculative and conjectural. The item of damages of \$23,340 for decrease in lamb production at Park City is erroneous because it is based on the assumption, without support in the evidence, that Stephen had the Swaner lease, an issue involved in litigation in another case.

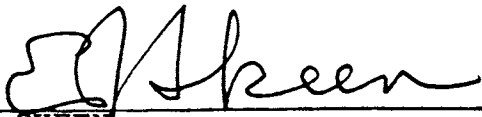
The trial court committed reversible error in failing to make sufficiently detailed findings on items of damages and in failing to make any findings and to enter a judgment in Case No. C82-3490.

The judgment should be reversed.

Respectfully submitted,

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By:


E. J. SKEEN
CLIFFORD L. ASHTON
50 South Main Street, Suite 1600
Post Office Box 3400
Salt Lake City, Utah 84110-3400
Telephone: 532-3333

CERTIFICATE OF DELIVERY

STATE OF UTAH)
) ss.:
County of Salt Lake)

I, Luise A. Chadwick, hereby certify that I am an employee of the law firm of Van Cott, Bagley, Cornwall & McCarthy, over the age of 18, that I am not a party to the above-captioned proceeding, and that I caused 3 true and correct copies of the foregoing BRIEF OF APPELLANTS to be delivered, by courier, this 9th day of July, 1984, to the following:

John B. Wilson
James B. Lee
PARSONS, BEHLE & LATIMER
185 South State Street
Post Office Box 11898
Salt Lake City, Utah 84147

Attorneys for Respondents.

Luise A. Chadwick
Luise A. Chadwick

SUBSCRIBED AND SWORN to before me this 9th day of July, 1984.

Lisa W. Willey
Notary Public
Residing at: Salt Lake County

My Commission Expires:

1-12-87

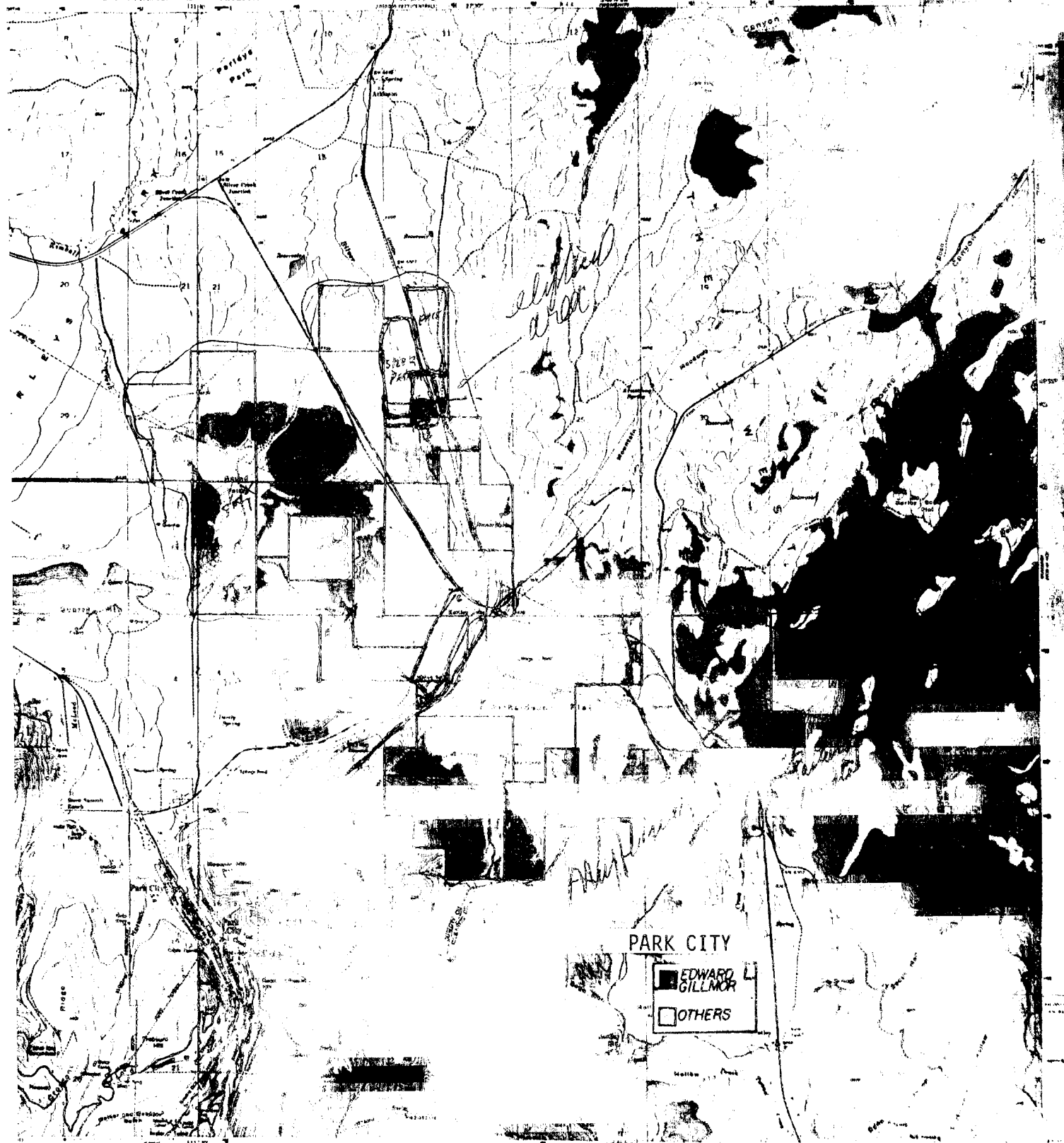
A P P E N D I X



PARK CITY WEST QUADRANGLE
UTAH
15 MINUTE SERIES (TOPOGRAPHIC)

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

PARK CITY EAST QUADRANGLE
UTAH
15 MINUTE SERIES (TOPOGRAPHIC)



SYMBOLS
Primary highway
Secondary highway
Interstate Route
11.5 Miles
State Road
10 Miles
15 Miles
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25 Miles
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EDWARD GILLMOR
OTHERS

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EDWARD GILLMOR
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1:125,000
1:250,000
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CRANDALL CANYON QUADRANGLE
UTAH - SUMMIT CO.
7.5 MINUTE SERIES (TOPOGRAPHIC)

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